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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 vs.

14 JOEL VARGAS-HERNANDEZ,

15 Defendant.

CASE NO. 10CR3889 WQH

ORDER

16 HAYES, Judge:

17 The matter before the Court is the Motion to Dismiss the Indictment under 8 U.S.C. §
18 1326(d) filed by the Defendant Joel Vargas-Hernandez. ECF No. 17.

19 **FACTS**

20 In September 1988, Defendant appeared before an Immigration Judge and was ordered
21 removed to Mexico. Defendant was subsequently physically removed to Mexico pursuant to
22 this order.

23 On May 5, 1995, Defendant sustained a conviction for first degree burglary in Orange
24 County, California in violation of California Penal Code §§ 459-461. Defendant was
25 sentenced to six years in prison for the burglary conviction and one additional year for a
26 recidivist enhancement.

27 On December 31, 1998, an Immigration Judge entered an order of removal against
28 Defendant after a immigration hearing. In the hearing, Defendant admitted that he had been

1 convicted of first degree burglary in Orange County in 1995 and sentenced to seven years in
 2 prison. Based in part upon this admission, the Immigration Judge found that the Defendant
 3 had been convicted of an aggravated felony; that he was removable; and that no other form of
 4 relief was available.

5 **CONTENTIONS OF THE PARTIES**

6 Defendant asserts that he was removed when he should not have been. Defendant
 7 asserts that the California offense of first degree burglary categorically cannot constitute
 8 aggravated felony of “burglary” under 8 U.S.C. § 1101(a)(43)(G)¹ because it is missing an
 9 element of generic burglary. The Government asserts that the Defendant’s conviction in 1995
 10 first degree burglary conviction and sentence to seven years qualifies as an aggravated felony
 11 as a crime of violence under 8 U.S.C. § 1101(a)(43)(F)² as defined in Section 16(b) of Title
 12 18. Defendant responds that his 1995 California first degree burglary offense does not
 13 categorically constitute a “crime of violence” under 8 U.S.C. § 16(b) because the state statute
 14 does not require unlawful or unprivileged entry. Defendant asserts that he was eligible for pre-
 15 conclusion voluntary departure and that it is plausible that he would have been granted pre-
 16 conclusion voluntary departure.

17 **APPLICABLE LAW**

18 A defendant charged with a violation of Section 1326 may collaterally attack the prior
 19 deportation prior to trial under the due process clause. *United States v. Pallares-Galan*, 359
 20 F.3d 1088, 1095 (9th Cir. 2004). In order to sustain a collateral attack under §1326(d), a
 21 defendant must, within constitutional limitations, demonstrate: (1) that he exhausted all
 22 administrative remedies available to him to appeal his removal order, (2) that the underlying
 23 removal proceedings at which the order was issued improperly deprived him of the opportunity
 24 for judicial review, and (3) that the entry of the order was fundamentally unfair. 8 U.S.C. §

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 26 ¹8 U.S.C. § 1101(a)(43) states: “the term ‘aggravated felony’ means...(G) a theft offense
 27 (including receipt of stolen property) or burglary offense for which the term of imprisonment at least
 one year.”

28 ²8 U.S.C. § 1101(a)(43) states: “the term ‘aggravated felony’ means...(F) a crime of violence
 (as defined in section 16 of Title 18, but not including a purely political offense) for which the term
 of imprisonment at least one year.”

1 1326(d). An underlying removal order is fundamentally unfair if: 1) an alien's due process
 2 rights were violated by defects in the underlying proceedings, and 2) he suffered prejudice as
 3 a result of the defects. *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1047 (9th Cir. 2004).

4 DISCUSSION

5 The issue presented in this case is whether Defendant's 1995 California conviction for
 6 first degree burglary in 1995 categorically constitutes a "crime of violence" under 8 U.S.C. §
 7 16(b).³

8 A person commits first degree burglary only if he commits "burglary of an inhabited
 9 dwelling." Cal. Penal Code §460(a).⁴ An inhabited dwelling house means "a structure where
 10 people ordinarily live and which is currently being used for dwelling purposes." *People v.*
 11 *Rodriguez*, 122 Cal. App.4th 121, 132 (Cal. App. 2 Dist. 2004) (citation and internal quotation
 12 marks omitted). A conviction for first-degree burglary under California Penal Code §§ 459
 13 & 460(a) requires proof of three elements: 1) entry into a dwelling house; 2) that was inhabited
 14 at the time of entry; and 3) with the intent to commit larceny or a felony. *People v. Anderson*,
 15 47 Cal.4th 92, 100 (2009).

16 In *United States v. Becker*, 919 F.2d 568 (9th Cir. 1990), the Court of Appeals held that
 17 the defendant's first degree burglary convictions under Cal Penal Code §§ 459-460 fit the
 18 statutory definition of a "crime of violence" as defined in 18 U.S.C. § 16(b). Becker had been
 19 found to be a career offender as defined in Section 4B1.1 of the United States Sentencing
 20 Guidelines. The Court of Appeals stated:

21 We begin our inquiry with the language of 18 U.S.C. § 16(b). It provides that a
 22 "crime of violence" is any felony that inherently involves "a substantial risk that
 23 physical force against the person or property of another may be used in the
 24 course of committing the offense." First degree burglary under California law
 involves just such a risk. Any time a burglar enters a dwelling with felonious or
 larcenous intent there is a risk that in the course of committing the crime he will
 encounter one of its lawful occupants, and use physical force against that

25 ³18 U.S.C. § 16 states in relevant part: "The term 'crime of violence' means – (b) any other
 26 offense that is a felony and that, by its nature, involves a substantial risk that physical force against
 27 the person or property of another may be used in the course of committing the offense."

28 ⁴Specifically, section 460 defines first degree burglary as "[e]very burglary of an inhabited
 dwelling house, vessel, ... which is inhabited and designed for habitation, floating home, ... or trailer
 coach ... or the inhabited portion of any other building..." § 460, subd. (a).

1 occupant either to accomplish his illegal purpose or to escape apprehension.
 2 919 F.2d at 571.

3 The Court of Appeals in *Becker* included the following footnote:

4 California law does not require that the entry itself be illegal for a defendant to
 5 be convicted of burglary. *See People v. Pendleton*, 25 Cal.3d 371, 382, 599 P.2d
 6 649, 656, 158 Cal.Rptr. 343, 349 (1979) (explaining that “one may be convicted
 7 of burglary even if he enters with consent, provided he does not have an
 8 unconditional possessory right to enter”). However, we are unaware of any
 9 California case holding that a defendant may be convicted of first degree
 10 burglary where he entered the dwelling of another with the intent to commit a
 11 felony in cooperation with a lawful occupant of that dwelling, or where the
 12 lawful occupant was aware that the defendant intended to commit a felony.
 13 Thus, for example, we do not believe that the California courts would conclude
 that a stock trader who went to an associate's house to concoct an insider trading
 scheme would be guilty of first degree burglary, even though he entered with the
 intent to commit the felony of conspiracy to perpetrate a fraud. See Cal. Penal
 Code Ann. § 182(4) (West 1988). By defining first degree burglary as “burglary
 of ” a dwelling, the language of section 460 implies that the intended felony
 must be committed *against* the property or person of the lawful resident. Thus,
 in every crime that we believe the California Supreme Court would consider first
 degree burglary, there is a substantial risk that force will be used *against* the
 person or property of a lawful occupant of the dwelling.

14 *Id.* at FN 5. The Court of Appeals discussed and decided whether “the conclusion of the
 15 district court that daytime burglary of a residence was intended by the Sentencing Commission
 16 to count as a violent offense for sentencing enhancement purposes” and upheld the decision
 17 of the district court. The Court of Appeals in *Becker* concluded:

18 The confluence of common sense and precedent lead to the conclusion that the
 19 unauthorized daytime entry of the dwelling of another with the intent to commit
 20 a larceny or any felony carries with it a substantial risk that force will be used
 21 against the person or property of another. Therefore, first-degree burglary under
 22 California law is a “crime of violence” for purposes of sentence enhancement
 23 under the career criminal provisions of the federal Sentencing Guidelines.

24 919 F.2d at 573.

25 In this case, the Defendant asserts that the holding in *Becker* has been undermined by
 26 subsequent cases which conclude that first degree burglary cannot categorically qualify as
 27 “burglary of a dwelling” under Section 2L1.2 of the Guidelines because the state statute does
 28 not require an unlawful entry. Defendant asserts that *Becker* is not controlling because the
 underlying rationale that the element of unlawful entry is implied in the California first degree
 burglary statute no longer applies. *See United States v. Parker*, 5 F.3d 1322 (9th Cir. 1993)
 and *United States v. Rodriguez-Rodriguez*, 393 F.3d 849 (9th Cir. 2005). The Government

1 asserts that *Becker* has not been overruled and remains binding precedent.

2 While the daytime/nighttime burglary was the disputed issue in *Becker*, the Court of
 3 Appeals concluded that “first-degree burglary under California law is a ‘crime of violence’ for
 4 purposes of sentence enhancement under the career criminal provisions of the federal
 5 Sentencing Guidelines” using the same definition in 18 U.S.C. § 16(b) that applies in this case.
 6 *Becker*, 919 F.2d at 573. *Becker* has not been overruled. The Court of Appeals continues to
 7 rely upon *Becker*. See e.g., *Malta-Espinoza v. Gonzalez*, 478 F.3d 1080, 1084 (9th Cir. 2007);
 8 *Covarrubias Teposte v. Holder*, 632 F.3d 1049, 1055 (9th Cir. 2010); and *United States v.*
 9 *Mercado-Arechiga*, 2011 WL 1522479 (April 21, 2011 C.A.9) (unpublished).⁵

10 *Becker* remains binding precedent in this case. California first degree residential
 11 burglary is categorically an offense that “involves a substantial risk that physical force against
 12 the person or property of another may be used in the course of committing the offense” as
 13 defined by 18 U.S.C. § 16(b), which renders an individual statutorily ineligible for voluntary
 14 departure.

15 IT IS HEREBY ORDERED that the Motion to Dismiss the Indictment under 8 U.S.C.
 16 § 1326(d) filed by the Defendant Joel Vargas-Hernandez ECF No. 17 is denied.

17 DATED: May 23, 2011

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 19 **WILLIAM Q. HAYES**
 20 United States District Judge

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⁵ The Court of Appeals in a Memorandum disposition stated “*Becker* remains good law and we are bound by it.”